IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Appellate Side

Writ Petition No.639 of 2005

Janata Sahakari Bank Ltd...Petitioner
vs
Asst Provident Fund Commer
and Recovery Officer and ors.....Respondents

Mr.Ameet Borkar for petitioner
Mr Suresh Kumar for respondents

CORAM: A.P.SHAH & D.Y.CHANDRACHUD JJ.

Dated 23.6.2005

Per A.P.Shah J.

. Rule. Learned counsel for the respondents waive service.By consent, rule is made returnable forthwith.

l. The case raises issue relating to the impact of the provisions of the Securitization and Reconstruction of Financial Assistance and Enforcement of Security Interest Act, 2002 (hereinafter called as "the Securitisation and Reconstruction Act") on the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, l952 (hereinafter called "the E.P.F.and M.P Act"). The petitioner before us is a cooperative bank registered under the provisions of the Maharashtra Cooperative Societies Act, l960.

The lst respondent is the ‘Recovery Officer’ within the meaning of section 3(kb) of the E.P.F & M.P Act who is also empowered to recover the Provident Fund dues by reason of section 8G of the said Act. The 2nd respondent is a proprietary concern carrying on business at Kolhapur.

2. The 2nd respondent was running an industrial unit engaging employees and was covered by the provisions of the E.P.F & M P Act . The 2nd respondent had obtained loans from the petitioner bank and executed loan agreements secured by mortgage of certain immovable properties belonging to it and by a deed of hypothecation certain movable properties. It appears that after September 2002 the 2nd respondent committed default in payment of contribution to the Employees Provident Fund under the E.P.F and M.P.Act. It also committed default in repayment of loan, which it had taken from the petitioner bank. Since the 2nd respondent did not pay its dues inspite of repeated demands by the bank and account of the respondent no. 2 became non-performing account as per the norms of the Reserve Bank of India, the petitioner bank issued notice dated l6.9.2003 under section l3(2) of the Securitisation and

Reconstruction Act and took possession of the immovable and movable properties of the 2nd respondent in May 2004. It appears that the petitioner bank tried to auction the said properties but sale did not materialise due to exparte stay obtained by the brother of the proprietor of the 2nd respondent from the civil court.

3. In the meantime on 24.ll.2004 the lst respondent sealed the immovable property of the 2nd respondent which was mortgaged in favour of the petitioner bank. The petitioner bank by its letter dated l4.l2.2005 called upon the lst respondent to open the seal but did not receive any response from the lst respondent. The petitioner bank has therefore approached this Court under Article 226 of the Constitution for issuing a writ of mandamus or any other appropriate writ, order or direction directing the respondent no.l to open the seal put by him on the said properties and to allow the petitioner bank to sell the said properties.

4. Mr.Ameet Borkar, learned counsel appearing for the petitioner bank contends that the Securitisation and Reconstruction Act is a special

statute intended for expeditious adjudication and recovery of debts to banks and financial institutions. Section l3 of the said Act confers a right on the secured creditors to take possession of secured assets of the borrower including the right to sell for realisation of secured debts. The learned counsel contends that the petitioner bank had already taken possession of the said properties and perfected its right over the same and, therefore, the lst respondent had no authority to put his seal and attach the said properties. The provisions of section 35 of the Securitisation and Reconstruction Act are also urged in support of the overriding provisions. It is contended that under section 35, there is a non-obstante clause which gives a overriding effect to the provisions of the Securitisation and Reconstruction Act as against the laws in force. It is urged that the Securitisation and Reconstruction Act is a special statute and it would have a overriding effect on the provisions of the EPF and MP Act. If EPF and MP Act and Securitisation and Reconstruction Act both are treated as special laws then the principle that when there are two special laws, the later will normally prevail over the former, if the provisions in the later Act giving it overriding

effect can also be applied. Such a provision is there in the Securitisation and Reconstruction Act namely section 35. It is urged that the court must interpret the Securitisation and Reconstruction Act so as to sub-serve the purpose of realisation of thousands of crores of bank funds which are due . The learned counsel in the alternative contended that what the petitioner bank has is the mortgage in its favour while the Provident Fund dues are merely demand or a charge on the assets. It is contented that, since the charge itself came into effect subsequently,it would be of no consequence and the petitioner's debts are to be first met out of the assets before the Provident Fund dues can be realised therefrom. In support of this proposition, the learned counsel relied upon the observations in para l0 of the judgment of the Supreme Court in the case of Dena Bank vs. Bhikabhai Prabhudas Parekh and Co and ors, (2000) 5 SCC 694.

5. Mr. Sureshkumar, learned counsel for the respondents, on the other hand, submitted that section ll of the EPF and MP Act provides for priority on payment of contribution over other debts thus the provident fund dues will have

precedence over the claim of the petitioner bank. Mr. Sureshkumar urged that the provision similar to section ll of the EPF and MP Act was considered by the Supreme Court in the case of State Bank of Bikaner and Jaipur vs National Iron and Steel Rolling Corporation and ors ,l995(2) SCC l9 wherein it was held that section ll AAAA of the Rajasthan Sales Tax Act, l954 has precedence over the existing mortgage. The learned counsel also referred to the decision of the Division Bench of Kerala High Court in the case of Recovery Officer and Asst Provident Fund Commissioner vs. Kerala Financial Corporation , 2002 III CLR l9l wherein the Division Bench has held that section ll(2) of the EPF and MP Act overrides the provisions of other enactments including section 46B of the State Financial Corporation Act, l95l. He submitted that the two Acts i.e. Securitization and Reconstruction Act and EPF and MP Act do not occupy the same field and there is nothing in the Securitization and Reconstruction Act to suggest that the legislature intended to override the provisions of the EPF and MP Act which is a beneficial legislation.

6. Before adverting to the rival submissions made

at the Bar it is necessary to notice certain statutory provisions. The EPF and MP Act is an Act to provide for the institution of Provident Fund, Pension Fund, Deposit Linked Insurance Fund etc. in factories and other establishments to carry forward the constitutional mandate of rendering social justice to the working class. It is intended to give social security to industrial workers at the end of their careers. The EPF and MP Act requires every employer to deduct certain prescribed amounts from the wages payable to employees along with prescribed contribution in the Provident Fund . The Provident Fund is administered by the Central and Regional Provident Fund Commissioners, who are statutory authorities. Section ll of the EPF and MP Act declares the priority of payment of contributions under the Act over other debts. Sub-section (l) of section ll of the EPF and MP Act deals with the question of priority where an employer is adjudicated insolvent or being a company subjected to an order of winding up. Sub-section (2) of section ll deals with other types of priorities and reads as under;

> "ll(2) Without prejudice to the provisions of sub-section (l), if any amount is due

> from an employer, whether in respect of the employee's contribution deducted from the wages of the employee or the employer's contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law, for the time being in force, be paid in priority to all other debts".

Sub-section (2) of section ll of the EPF and MP Act has two facets. First it declares that the amount due from the employer towards contribution under the EPF and MP Act shall be deemed to be first charge on the assets of the establishment . Second, it also declares that notwithstanding anything contained in another law for the time being in force, such debt shall be paid in priority to all other debts. Both these provisions bring out the intention of Parliament to ensure the social benefits as contained in the legislation. There are other provisions in the Act rendering the amounts of Provident Fund payable immune from attachment of Civil Courts decree, which also indicates such intention of Parliament.

7. The Securitisation and Reconstruction Act was enacted by the Legislature to regulate the securitisation and reconstruction of financial assistance and enforcement of security interest and for matters connected therewith or incident thereto. As can be seen from the Statement of Objects and Reasons the said Act is the result of the Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining the banking sectors reforms and for considering the need of changes in legal systems in respect of those areas. These Committees, inter alia have suggested enactment of a new legislation for securitisation and empowering the banks and financial institutions to take possession of the securities and to sell them without intervention of courts. Acting on these suggestions the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance,2002 was promulgated on 3l.6.2002 and later on the Ordinance was replaced by the Act. Chapter I of the Act contains definition and inter alia defines secured asset in clause (zc) of section 2(l) to mean property on which secured interest is created. "Secured

creditor" has been defined in clause (zd) of section 2(l) which means any bank or financial institutions or any consortium or group of banks or financial institutions and includes debenture trustee appointed by any bank or financial institution or securitisation company or reconstruction company or any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance. 'Secured debt' has been defined in clause (ze) of section 2(l) which means debt which is secured by any security interest. Security interest has been defined in clause (zf) of section 2(l) to mean right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 3l. Section l3 which is material for our purpose provides that a secured creditor may enforce any security interest without intervention of the court or tribunal irrespective of section 69 or section 69A of the Transfer of Property Act where according to sub-section (2) of section l3 the borrower is a defaulter in repayment of secured debt or any

instalment of repayment and further the debt standing against him has been classified as a non-performing asset by the secured creditor. Sub-section (2) of section l3 further provides that before taking any steps in the direction of realising the dues, the secured creditor must serve a notice in writing to the borrower requiring him to discharge the liabilities within a period of 60 days failing which the secured creditor would be entitled to take any of the measures as provided in sub-section (4) of section l3. Sub-section (4) provides for four measures which can be taken by the secured creditor in the case of non-compliance with the notice served upon the borrower. Under clause (a) of sub-section 4 the secured creditor may take possession of the secured assets including right to transfer the secured assets by way of lease, assignment or sale; may take over the management of the secured assets under clause (b) including right to transfer; under clause (c) of sub-section (4) a manager may be appointed to manage the secured assets which have been taken possession of by the secured creditor and may require any person who has acquired any secured assets from the borrower or from whom any money is due to the borrower to pay the same to him as it

may be sufficient to pay the secured debtor as provided under clause) of section 3(4) of the Act. Sub-section (6) provides that any transfer of secured asset after taking possession thereof or takeover or management under sub-section (4) by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset. Sub-section (8) of section l3 provides that if all the dues of the secured creditor including all costs, charges and expenses, etc, as may be incurred are tendered to the secured creditor before sale or transfer, no further steps be taken in that direction. Section 35 of the Act says that the provisions of the Act shall have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

8. The contention of Mr. Borkar based on the overriding effect of the provisions of section 35 of the Securitisation and Reconstruction Act has no substance in our judgment. Normally the use of a phrase by the Legislature in an enactment stating

that its provisions will have the effect "notwithstanding anything inconsistent therewith contained in any other law for the time being in force" is another way of saying that the enactment in which the non-obstante clause occurs usually would prevail over the other law. The non-obstante clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provisions of the law, but merely as clauses which remove all obstructions which might arise out of the operation of the enactment which contains a non-obstante clause. The conflict in such cases is resolved on consideration of purpose and policy underlying the enactments and the language used in them. If we examine the scheme of the two Acts in question i.e the Securitisation and Reconstruction Act and the EPF and MP Act,they seem to operate in two different fields and there is no conflict in them. Undoubtedly the intention of the Parliament in enacting the Securitisation and Reconstruction Act was to ensure that the banks and financial institutions can quickly and effectively recover the amount due by taking possession of the secured assets of the defaulters instead of having resort to the cumbersome method of recovery through civil

courts or tribunals. The said Act is enacted to have yet speedier legal method to recover the dues of the banks and financial institutions. The provisions of section l3 of the said Act give right to the banks and financial institutions to take possession of the secured assets and realise their dues by resorting to any of the four methods provided under sub-section (4) of section l3. The intention of the Legislature was not to give any precedence to the dues of the banks and financial institutions over the statutory dues under such provisions as made in the said Act. The Act does not have any substantive provision giving precedence to the dues of the banks and financial institutions. Whereas the Legislature specifically enacted sub-section (4) of section ll declaring that the amounts due as contribution to the Employees Provident Fund shall be made a first charge on the assets of the establishment and that, notwithstanding anything contained in any other law for the time being in force, it shall be paid in priority against all other dues. The reason for this is obvious. The Legislature intended to secure the terminal social security benefit made available by the statute to the working class. Taking into consideration that EPF and MP Act is a

social benefit legislation, and the evil consequences of Provident Fund dues being defeated by prior claim of the secured and un-secured creditors, the Legislature took care to declare that irrespective of when the debt is created the dues under the EPF and MP Act would always remain first charge and shall be paid first out of the assets of the establishments. The non-obstante clause contained in section 35 of the Securitisation and Reconstruction Act has to be construed and given effect to having regard to the object and purpose of the said Act and so construed it does not in any way effect the operation of the
provisions of EPF and PM Act. We are therefore of the view that the respondent. no.l shall be entitled to exercise power as a Recovery Officer for recovering Provident Fund dues.

9. In the case of Recovery Officer and Asst P.F.C. vs Kerala Finance Corporation (supra) the Division Bench of Kerala High Court held that section ll(2) of the EPF and MP Act overrides the provisions of all other enactments including section 46(b) of the State Financial Corporation Act, l95l. In that case the Recovery Officer had issued attachment and

prohibitory orders in respect of the amount laying in the bank account of the company which owed money to the Corporation. The Corporation moved the court contending that it had priority in the matter of satisfaction of its debts being a prior secured creditor. It has urged that section 46(b) of the State Financial Corporation Act contains a non-obstante clause, which gives overriding effect to the provisions of the said Act as against the laws in force. The learned Single Judge accepted the contention of the Corporation and quashed all notices of attachment and prohibitory orders. In appeal the Division Bench held that though both State Financial Corporation Act and the EPF and MP Act declare their intent by usage of non-obstante clause but, since section ll(2) of the EPF and MP Act has been enacted later, one must ascribe to the Parliament intention to override the earlier legislation also. The Division Bench also held that the social purpose behind the amendment of section ll(2) is to protect the terminal social security dues of the workmen, and therefore needs to be given higher priority as intended by the Parliament.

l0. In A.P.State Financial Corporation vs Official

Liquidator, (2000) 7 SCC 29l the Corporation had exercised its power under section 29 of the State Financial Corporation Act in respect of a debtor company which was under liquidation. The Corporation claiming to be a secured creditor filed two applications under section 446(l) of the Companies Act read with section 29 and 46 of the State Financial Corporation Act, for staying outside the liquidation proceedings. The learned Company Judge allowed the applications on behalf of the specific condition that the Corporation should undertake to discharge the liability due to the workers under section 529A of the Companies Act and also inform the Official Liquidator by advance notice about the proposed sale of the company's property and further obtain Company Court's permission before the finalisation of tender. This order of the Company Judge was upheld by the Division Bench of A.P High Court. The appeal was carried thereafter by the State Financial Corporation to the Supreme Court. The Supreme Court considered the reasons for enactment of the State Financial Corporation Act as against the reason for amendment of section 529A of the Companies Act. The Supreme Court pointed out that though the SFC Act, l95l was a special Act for

grant of financial assistance to industrial concerns with a view to boost industrialisation and to enable the recovery of amounts advanced and the Companies Act was also an Act dealing with the companies including winding up of such companies, the proviso to sub-section (l) of section 529 and 529A being subsequent enactments, the non-obstante clause in section 529A prevails over section 29 of the SFC Act. Hence, the Supreme Court held that the statutory right to sell the property under section 29 of the SFC Act had to be exercised with the right of pari pasu charge to the workmen specifically created by the proviso to section 529 of the Companies Act. Under the proviso to sub-section (l) of section 529 a Liquidator shall be entitled to represent the workmen to enforce the above pari pasu charge. The judgment of the Company Court was upheld. While upholding the judgment of the Company Court, it was pointed out by the Supreme Court that the Legislature amended Companies Act, l985 with social purpose namely to protect the dues of the workmen. If conditions are not imposed to protect the rights of the workmen there is every possibility that the secured creditors may frustrate the pari pasu charge of the workmen under the said provision of law.

ll. In our view, the ratio of the judgement of the Supreme Court in A.P.State Financial Corporation vs. Official Liquidator (supra) and the judgment of the Division Bench of Kerala High Court in Recovery Officer and Asst P.F.C vs Kerala Financial Corporation (supra) is equally applicable to the case before us. The Securitization and Reconstruction Act does not have any substantive provision that the debts of the banks and financial institutions have a priority over the statutory dues. We have seen that as far as the dues under the Employees Provident Fund are concerned section ll(2) of the EPF and MP Act specifically has a substantive provision to declare the Provident Fund dues shall be made a first charge on the assets of the establishment and shall be paid in priority to all other debts. In view thereof, we do not have any hesitation in rejecting the contention of Mr.Borkar that by virtue of section 35 of the Securitisation and Reconstruction Act the dues of the petitioner bank will have precedence over the Provident Fund dues.

l2. We are also not impressed by the submission of Mr.Borkar that the petitioner bank being a secured

creditor petitioner's debts are to be first met out of the assets before the Provident Fund dues could be realised therefrom. In the case of State Bank of Bikaner and Jaipur vs. National Iron and Steel Rolling Corporation and ors(supra) the State Bank of Bikaner and Jaipur claimed priority over the sales tax arrears due to the State on the ground that it was a secured creditor. Section llAAAA of the Rajasthan Sales Tax Act declares that any amount of tax, penalty, interest of any other sum, if any, payable by a dealer or any other person under the Act,shall be the first charge on the property of the dealer, or such person. On behalf of the State Bank of Bikaner and Jaipur section l00 of the Transfer of Property Act was relied upon to contend that, since there was a mortgage in favour of the bank, the bank would have a precedence over the claim of the sales tax dues, which was only by way of charge. After analysis of section l00 of the Transfer of Property Act, and considering the distinction drawn between a mortgage and charge as discussed in earlier decision in Dattatraya Shanker Mote vs Anand Chintaman Datar, (l974) 2 SCC 799,it was held that the expression "transferee of property" used in section l00 refers to transferee of entire interest in the property and it does not

cover the transfer of only an interest in the property by way of a mortgage. It was held that section ll AAAA of Rajasthan Sales Tax Act creates first charge on the property, thus clearly giving priority to the statutory charge over all other charges on the property including a mortgage. It was further held that a charge is a wider term than a mortgage. It would cover within its ambit a mortgage also. Therefore when a first charge is created by operation of law over any property, that charge will have precedence over an existing mortgage.

l3. The decision of the Supreme Court in Dena Bank vs Bhikabhai Prabhudas Parekh and Co (supra) relied upon by Mr. Borkar is of no assistance to him. In fact in that case the Court held that section l58(l) of the Karnataka Land Revenue Act which specifically provides that the claim of the State Government to any moneys recoverable under the provisions of Chapter XIV of the Act shall have precedence over any other debt,demand or claim whatsoever including in respect of mortgage not only gives a statutory recognition to the doctrine of the State’s priority for recovery of debts but also extends its applicability over private debts

forming the subject matter, judgement- decree, execution or attachment and the like.

l4. In the result, we hold that the dues of the Employees Provident Fund has priority as against the assets of the respondent no. 2, movable or immovable and the respondent no.l as the Recovery Officer was entitled to attach the property . Mr.Suresh Kumar fairly stated that since the petitioner bank has taken possession of the assets respondent no.l has no objection if the assets are sold by the bank provided that the sale proceeds shall be first satisfied towards the Provident Fund dues. Mr. Borkar has no objection to this course suggested by Mr.Suresh Kumar and sale proceeds will be first appropriated towards the Provident Fund dues and the said dues will be paid over to the respondent no.l. The petition stands disposed of accordingly.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE FCJURISDICTION

Writ Petition No.639 of 2005

Date of Judgment: 23rd June 2005

For approval and signature of:

The Hon'ble Mr.A.P.SHAH J.

The Hon'ble Mr. D.Y.CHANDRACHUD J.

1. Whether the Reporters of the local papers may be allowed to see the judgment/order?

2. Whether to be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad and Goa offices?